UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALLISON LITT,

Plaintiff,

v.

PAUL REVERE LIFE INSURANCE COMPANY, et al.,

Defendants.
_____/

No. C 04-0561 PJH

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' motion for summary judgment came on for hearing before this court on March 8, 2006. Plaintiff appeared by her counsel Gerard Engelskirchen, and defendants appeared by their counsel Sean P. Nalty. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motion for the following reasons.

BACKGROUND

This is an action brought under § 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), challenging the denial of payment of long-term disability benefits under an "own occupation" disability benefits policy. Plaintiff Alison Litt was employed as an administrative assistant by Sazevich Faulkner Associates ("Sazevich"), an architectural firm, and was insured under defendant Sazevich Faulkner Associates Group Long Term Disability Plan ("the Plan"), an employee welfare benefit plan governed by ERISA. Defendant Paul Revere Life Insurance Company ("Paul Revere") issued the policy under which Sazevich was covered. Defendant UnumProvident Corporation ("UnumProvident") is Paul Revere's parent company.

The Plan policy provides benefits whenever the employee is disabled from her own occupation. Under the policy, an employee is disabled if she meets the definition for either Total Disability or Partial Disability, defined as follows:

> **TOTAL DISABILITY** or **TOTALLY DISABLED FROM THE EMPLOYEE'S OWN OCCUPATION** means that until he reaches the end of his Maximum Benefit Period, the Employee:
>
> 1. is unable to perform the important duties of his own occupation on a Full-time or part-time basis because of an Injury or Sickness that started while insured under this Policy; and
>
> 2. does not work at all; and
>
> 3. is under Doctor's Care.
>
> If the employee is employed and is earning wages or a salary, he will be considered Partially Disabled as defined below.
>
> **PARTIAL DISABILITY** or **PARTIALLY DISABLED** means, as a result of Injury or Sickness, the Employee is unable to perform the important duties of his own occupation on a Full-time basis, but:
>
> 1. he is able to perform one or more of the important duties of his own occupation, or any other occupation, on a Full-time or part-time basis; and
>
> 2. he is earning less than 80% of his Prior Earnings.
>
> To qualify for the Own Occupation Benefit with Partial Disability, the Employee:
>
> 1. must satisfy the Elimination Period with the required number of days of Total and/or Partial Disability as defined in the Policy; and
>
> 2. must be receiving Doctor's Care. We will waive the Doctor's Care Requirement if We receive written proof acceptable to us that further Doctor's Care would be of no benefit to the Employee.

Administrative Record ("AR") at 567.

Plaintiff began working as an administrative assistant at Sazevich on October 1, 1995. Her duties included reception, customer service, accounts payable, and data entry. In April 1997, plaintiff began feeling a sharp, burning pain running down the little finger on her left hand. She reported that the pain would come and go, but that eventually she was unable to open her hand. AR 480-482.

Plaintiff stated that she first consulted Dr. Tracy A. Newkirk – a neurologist who is

the medical director of the Newkirk Neurology METS Clinic – on May 15, 1997, and he diagnosed an "industrial injury." AR 481. On May 23, 1997, Dr. Newkirk indicated that plaintiff would be able to return to work on June 9, 1997. AR 147. Plaintiff applied for and began receiving worker's compensation benefits. She did not return to work at Sazevich after May 15, 1997.

On May 28, 1997, Dr. Newkirk wrote the Claims Examiner for Kemper Insurance ("Kemper") – plaintiff's worker's compensation carrier – that plaintiff had "a postural strain syndrome related to a work situation in which the keyboard is clearly very much too high," which "has led to increased forearm muscle tone called dystonia, aggravation of the extensor tendons equivalent to tendonitis, and increased pain in her neck and shoulders, equivalent to postural strain with a myofascial thoracic outlet syndrome."[1] AR 149.

Dr. Newkirk also noted that plaintiff "already had ongoing neck and upper extremity symptoms from previous trauma" and that she had previously been seen in his office on November 4, 1994, because of an automobile accident that had occurred on October 25, 1994. Her condition had "improved over time with extensive therapy" but she "never made a full return to work." As of early 1997, she was "frequently symptom-free, but was not well tolerant of gripping, reaching, and other activities which require her to reach forward in front of herself in the seated position." AR 148-149.

Dr. Newkirk stated that plaintiff had an "aggravation of the structural changes in her neck and upper thoracic area," but that she also had "overuse symptoms with dystonia in the wrists, forearms, and arms, which is entirely unrelated to any previous injury." As of May 28, 1997, Dr. Newkirk was of the opinion that plaintiff could return to work doing "limited duty, approximately half time." He stated that plaintiff could do "some phone work

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[1] "Dystonia" is defined as "abnormality of muscle tone." Attorney's Illustrated Medical Dictionary (1997). It is a "state of abnormal tonicity in any of the tissues resulting in impairment of voluntary movement." Stedman's Medical Dictionary (27th ed. 2000). "Tendinitis" (or "tendonitis") is an inflammation of a tendon. Id. "Thoracic outlet compression syndrom" is "[a] group of ill-defined syndromes characterized by symptoms of pain and parasthesias in the hand, neck, shoulder, or arms." Merck Manual of Diagnosis and Therapy (17th ed. 1999). "Pathogenesis is unknown." Id.

and filing, but needs to change position frequently, and cannot work at a computer for more than 15 to 20 minutes at a time." He indicated that an ergonomically correct work station would "greatly accelerate her recovery," and that computer work should be limited "until such time as the keyboard is lowered and other adjustments put in place." AR 148-149.

Beginning on May 28, 1997, plaintiff received physical therapy, which included "work hardening" and upper quadrant exercise classes.[2] On June 3, 1997, Dr. Newkirk indicated that plaintiff would be able to return to work on July 1, 1997. AR 153. On June 11, 1997, he stated that plaintiff should be able to return to work on July 21, 1997 – four hours a day the first week, and then only with a properly adjusted work station. AR 152. On June 23, 1997, he stated that plaintiff was "unable to work in any capacity at this time because of arm pain," and again indicated that she should be able to return to work on July 21, 1997 – depending on "the acquisition of a correctly appointed work station." AR 155.

On July 18, 1997, Dr. Newkirk reported that plaintiff "is now making progress," though "it is really very slow," noting that "[w]e have seen a similar situation occur in the past when she had an automobile accident." He added that "her forearms are still involved in a process that causes unusual sustained muscle contraction," which he stated was "consistent with a diagnosis of acquired limb dystonia" – something that "happens in people who use computer-based work stations that are improperly adjusted." He indicated that he was adjusting her medication in an attempt to find an effective drug for her condition. He concluded that plaintiff was still "highly symptomatic," but would try to return to work once her work station was fully adjusted. AR 157-158.

On August 15, 1997, Dr. Newkirk reported to Kemper that plaintiff continued to make progress – "It is slow, but now it is more promising." He indicated that he was still working on adjusting plaintiff's medication. He stated that she could return to work on September 8, 1997, but only for four hours per day (though he noted that "the employer is not happy with the idea of part time return"). AR 159. On September 3, 1997, he reported to Kemper that

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[2] The records indicate that the physical therapy was also provided by the Newkirk Neurology METS Clinic.

plaintiff's employer had denied return to work until plaintiff was ready for full time, and stated that "through the rehab nurse we will be requesting work hardening, two hours for two days, then four hours for two days, to assess her ability to return to work." AR 160.

During September 1997, plaintiff participated in a 12-hour work-hardening program spread out over four sessions, at the Newkirk Neurology METS Clinic. The purpose of the program was to increase plaintiff's tolerance for the activities required of her job as an administrative assistant in an architectural firm. A Work Hardening Summary Report was prepared by Julie Gardner, P.T.

Ms. Gardner stated that plaintiff had indicated a decrease in symptoms as of September 1997, and that she was able to perform activities around the house that she previously could not manage – vacuuming, making beds, cooking, washing dishes, and doing laundry. The report described plaintiff's duties as an administrative assistant, and stated that since the bulk of plaintiff's duties involved use of the computer, the work-conditioning tasks emphasized techniques that would reduce strain on the left hand and arm. At the end of the four-day period, plaintiff had not made enough progress to return to her job, but she did show the potential to improve. Ms. Gardner suggested that a home work station be set up at plaintiff's father's house to allow plaintiff to practice some of the exercises at home. AR 211-216.

On September 27, 1997, Dr. Kirk stated that plaintiff could return to work on November 3, 1997, "full time with correct ergonomic work station." AR 143. On September 29, 1997, he reported to Kemper that plaintiff had "definitely made progress with work hardening, although not enough to return her to full time." He was hopeful that "she will make enough progress to return to full duty by early November." He also noted that plaintiff's employer "remains adamant that they will only accept her back full time." AR 161. On October 30, 1997, he stated that plaintiff could return to work on November 17, 1997, eight hours per day – "number of hours on keyboard to be specified in 2 weeks." AR 164.

On November 12, 1997, Dr. Newkirk reported to Kemper that plaintiff needed additional physical therapy and vocational rehabilitation. He noted, "Typing markedly

increased pain in left hand but also neck pain plus further reduction in cervical ROM. Hasn't been able to type for 4-5 days. . . . Exam shows neck and arms still flared." He recommended additional physical therapy "to recover from flare-up" and indicated that physical therapy would be required for an additional two years "to treat flare-ups." He added, "Needs ergo work station." He did not schedule a further appointment, but indicated that she should visit "as needed." AR 162.

On November 30, 1997, plaintiff submitted a claim to Paul Revere for long-term disability benefits. AR 256-261. At that time, plaintiff was twenty-nine years old. She stated that she could no longer work as an administrative assistant at Sazevich because "over a period of time . . . due to many repetitions at an improper work station, I have tendinitis in my hand, dystonia, thoracic outlet syndrome and postural pain." She stated that she had never previously had problems with her hand or arm. AR 261.

Plaintiff described her job duties at Sazevich as follows. She stated that she worked as a telephone receptionist 25 to 33 hours per week, which duty required her to "Pick-up telephone on an 8 line system, screen and root calls, take all handwritten messages on message pad (we do not have voice mail system)." She also performed certain duties in Accounts Payable and Receivable, for 10 to 25 hours per week. This required her to "[o]pen all AP/AR related bills, paper clip & tape bill to invoice, store in file, retrieve bills & type & enter all data into Quickbooks system." She also "[i]temize[d] invoices and cut checks." In addition, she spent up to 15 hours per week selecting supplies from brochures and catalogues, preparing order forms, submitting orders by fax or telephone, following up on late or wrong orders received, and putting away items throughout the office. Finally, she spent between 15 and 30 hours per week on "[d]ata entry and letter formats" and "[t]yping & entering information on spreadsheets including a variety of typing assignments for various projects. AR 259.

Although plaintiff's description of her job duties suggests that she worked between 60 and 88 hours per week, plaintiff stated on her November 30, 2006, claim for benefits that she worked 40 hours in a normal week at Sazevich. She stated that her "work load

was approximately 70% keyboard data entry & typing" and that "[e]very week was different."[3] In her opposition to the present motion, plaintiff explains that her duties varied from week to week, and that she never claimed to have worked more than 40 hours a week.

With the claim for benefits, plaintiff attached an "Attending Physician's Statement" ("APS") signed by Dr. Newkirk and dated December 8, 1997. Dr. Newkirk stated that he had first seen plaintiff in his office on May 14, 1997, and that she was experiencing left arm and hand pain, some pain in the right hand, upper back discomfort, tingling in the left hand, multilevel joint stiffness in the neck and upper back, and positive upper limb tension signs. He diagnosed plaintiff as suffering from problems of thoracic outlet syndrome, acquired dystonia, and tendinitis. In his opinion, plaintiff could not type at all or do other repetitive hand activities. He prescribed physical therapy, anti-inflammatories, and other medication, and stated that he expected that she could resume her job duties in 1-3 months. AR 257.

In a letter to the Kemper claims examiner dated December 17, 1997, Dr. Newkirk stated, "unequivocally," that plaintiff "cannot do any keyboard activity whatsoever," and that he did "not see that limit changing anytime in the near future." He based that limitation on the fact that plaintiff "still had symptoms ongoing from her work tolerance screening, done several weeks ago." He added that she was "able to push and pull frequently, as long as the force is less than five pounds," that her "lift and carry limit" was "five pounds," and that "the range is knee to shoulder level without overhead work whatsoever." In addition, "[r]epetitive gripping" was "precluded."

On January 20, 1998, Kemper advised plaintiff that her temporary disability benefits were ending because Dr. Newkirk deemed her medical condition permanent and stationary on November 12, 1997, and her employer had advised that it was unable to accommodate

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[3] Defendants note that while plaintiff asserted that 70% of her job involved keyboard data entry or typing, she listed numerous job duties that do not involve data entry or typing. In addition, the physical therapist conducting the work hardening program reported that plaintiff was not a touch typist, and that she typed only 21 words per minute.

her with permanent modified/alternate work as outlined by Dr. Newkirk's report dated December 17, 1997. Kemper requested that plaintiff submit to an examination by a Qualified Medical Evaluator in order to determine the existence and extent of permanent limitations. AR 175.[4] On February 2, 1998, Kemper wrote plaintiff to confirm her acceptance of Kemper's offer of vocational rehabilitation services. AR 177.

Plaintiff started working in a retail sales job at Restoration Hardware in Corte Madera on June 24, 1998. Plaintiff's worker's compensation attorney advised Paul Revere that plaintiff was working 32 hours as of June 29, 1998. She later described her job at Restoration Hardware as working "almost full time doing sales, customer service, restocking of merchandise and typing." She stated that the pain in her hand started to increase, and that her work hours decreased, although it is not clear from her statement whether the employer reduced her work hours for some reason, or whether she asked for reduced hours because of the problems with her hand. She "decided that a less strenuous job would perhaps help in reducing my pain." AR 481.

After nine months of investigation, Paul Revere approved plaintiff's claim on September 21, 1998, finding plaintiff disabled as of May 15, 1997, and entitled to receive benefits effective August 14, 1997, following exhaustion of the elimination period under the policy. Plaintiff's salary at the time of her claim was $2,017.00 per month, and she was therefore entitled to a maximum benefit of $1,210.20 a month before offsets.

On April 28, 1999, Dr. Newkirk completed an APS, stating that he had treated plaintiff from May 14, 1997, to April 28, 1999; that her prognosis was "stable," that she was permanently totally disabled from her job, though not disabled from other work; and that she would "never" be able to resume work without restrictions. The restrictions listed were "no typing, repetitive gripping, lifting, or reaching." On the same form, plaintiff stated that she was currently working part-time "occasionally on cash register, minimal re-stocking, mainly speak with customers and sell the merchandise." She also stated that at home, "I

[4] The record does not include any evidence of such an examination.

take daily walks, stretching & weight lifting with small weights." AR 032.

In September 1999, plaintiff reported to Paul Revere that she no longer worked at Restoration Hardware, and that she had started working at Nordstrom. She reported that she was able to work only part time because of her disability. She continued to work part-time at Nordstrom as a make-up salesperson until January 2000, when she was laid off. AR 266.

In mid-November 1999, plaintiff submitted a supplemental APS to Paul Revere, in which Dr. Newkirk stated that he had treated plaintiff from May 14, 1997, to November 8, 1999; that her prognosis was "stable;" that she was permanently totally disabled from her job, though not disabled from other work; and that she would "never" be able to resume work without restrictions. The restrictions listed were "no typing, repetitive gripping, lifting, or reaching." On the same form, plaintiff stated that she was currently working part-time "selling merchandise, minimal restocking & cash register, moving around constantly." She also stated that at home, "I take daily walks, stretching & weight lifting . . ." as before. AR 010.

In March 2000, plaintiff began working part-time at the Alexandria Gallery in Mill Valley. She described her duties as "jewelry sales and customer service, creating attractive jewelry displays, some data entry, and keeping accurate inventory records. She claimed, however, that "small finger grasping motions of showing rings and writing out jewelry tags became very painful, taking a heavy toll on my hands." AR 480-481.

On March 17, 2000, Dr. Newkirk completed a physical capacities evaluation form for Paul Revere. He indicated that plaintiff could stand 2 hours at a time, and 7 hours in a day; could walk without restrictions; could sit 1 hour at a time, and 6 hours in a day; could drive 1 hour at a time, and 4 hours in a day; could lift from waist and chest; could lift 2 pounds frequently and 25 pounds occasionally; and could use hands for simple grasping and pushing/pulling. Plaintiff was precluded from using her hands for fine manipulation or repetitive motion, and was precluded from performing overhead work. Dr. Newkirk added that plaintiff "needs absolutely correct ergonomic work station." AR 273.

In June 2000, plaintiff submitted a supplemental APS. Dr. Newkirk stated that he had seen plaintiff on June 5, 2000, and described plaintiff's condition in terms essentially identical to the descriptions in the April 28, 1999, APS and the November 8, 1999, APS. Plaintiff also described the same part-time work duties as previously reported. AR 280.

In December 2000, Paul Revere wrote plaintiff to request that she undergo a Functional Capacity Evaluation ("FCE") with a physical therapist of Paul Revere's choice. AR 309, 312. In January of 2001, plaintiff underwent a three-hour FCE at US HealthWorks in San Leandro.

Paul Revere/UnumProvident asked US Healthworks to assess plaintiff's functional capacity, to determine whether plaintiff was able to return to work as an administrative assistant, and to identify appropriate restrictions and limitations of plaintiff's occupational duties. Specifically, Paul Revere/UnumProvident asked US Healthworks to assess plaintiff's "functional performance, capacity;" to describe "her maximal tolerance, including frequency and duration of each activity;" to state whether "she [gave] maximum effort;" to state what level of work plaintiff would be able to perform in an 8-hour day; to state what specific restrictions and limitations would be appropriate; and to state which job duties plaintiff was and was not capable of performing, and which of those job duties would correlate with plaintiff's occupation. See AR 310-311.

US Healthworks submitted its report to Paul Revere/UnumProvident on January 30, 2001. See AR 321-349. The report of the FCE stated that plaintiff "did not demonstrate the ability to work as an administrative assistant," and that "[a]ny task requiring the use of the upper extremities, especially gripping and fingering activities, caused [plaintiff] to report the most pain and discomfort." While the report indicated that "[o]f the tests that [she] performed[,] consistent effort was demonstrated," it also stated that "force curve patterns suggest submaximal effort," that plaintiff was "self-limiting during the exam and very hesitant to perform most of the tasks," that "[s]ymptom magnification was observed," and that "[b]ecause of self-limited performance the majority of [plaintiff's] abilities remain open to conjecture." The report also noted that plaintiff requested frequent breaks and left the

room twice to "get air," and that she had reported lightheadedness and nausea, symptoms which the evaluator considered "not associated with physiological signs of color change, heart rate change, etc." AR 345-347.

On February 1, 2001, Dr. Newkirk signed an APS, indicating that he had seen plaintiff on that date.[5] The APS listed the following restrictions: "no data entry, typing, repetitive gripping, lifting, reaching." Dr. Newkirk described plaintiff's condition in terms identical to the descriptions in the April 1999 APS and the November 1999 APS, and the portion of the form completed by plaintiff described essentially the same part-time work duties as in the previous submissions. AR 356.

Also on February 1, 2001, plaintiff wrote the physical therapist who had performed the FCE. She stated that immediately after the testing, her arms and hands had been so "traumatized" that she was unable to drive herself home.[6] She claimed that as a result of the "stress & strain" of the three-hour-long test, she had experienced increased pains and was "virtually bedridden" for several days. She stated that she went to work on "Friday," but was unable to function and had to leave early, and that she missed work on "Sunday" as well.[7] She claimed that as of February 1, 2001, she was "still feeling the adverse effects

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[5] On July 17, 2000, in response to a request from Paul Revere for copies of plaintiff's medical records, Erika from Dr. Newkirk's office stated that Dr. Newkirk hadn't seen plaintiff since 1998, and had "no records since then." AR 287, 306. On July 19, 2000, a Paul Revere representative called Dr. Newkirk's office to ask why he had been signing the supplemental APSs if he hadn't seen plaintiff since 1998. AR 287. On July 21, 2000, Marsha from Dr. Newkirk's office responded that Dr. Newkirk had seen plaintiff in January 1999 and on June 5, 2000, and "only those times," and agreed to fax the office notes to Paul Revere. AR 287. However, the notes – one page, with a cover sheet dated July 26, 2000 – reflect a single visit on June 5, 2000, and carry only the following notation: "Fairly stable – still a lot of arm pain," plus a recommendation for medication. AR 288. This suggests that Dr. Newkirk did not see plaintiff in April 1999, November 1999, and February 2001, when he signed APSs for Paul Revere, indicating that he had seen her and was continuing treatment.

[6] The record shows that plaintiff's boyfriend drove her to the FCE appointment. Plaintiff later explained, however, that if she had wanted to drive herself, she would not have been able to drive home because of the pain.

[7] It is not clear which dates plaintiff is referring to – Friday and Sunday, January 19 and 21, 2001 – or Friday and Sunday, January 26 and 28, 2001. The evaluation was apparently performed on January 16, 2001. At one point, the report of the test says the date was January 23, 2001, but all the reports (which bear different dates) indicate that the individual tests were administered on January 16, 2001.

of the Jan. 16 FCE testing." AR 354.

Meanwhile, on January 31, 2001, and February 2, 2001, an investigator working for Paul Revere conducted video surveillance of plaintiff. AR 359-74. The investigator observed plaintiff using both her right and her left hand and arm to open and close the front door of her Mill Valley residence, the front gate opening onto the sidewalk, and the front and back doors and trunk door of her vehicle; to push a shopping cart; to place items into her vehicle and remove them; to carry grocery bags and personal items; and to drive her vehicle. He also observed her walking with both arms swinging, and walking with a purse hanging from her shoulder or carried in her hand. In engaging in these activities, plaintiff showed no signs of physical difficulty or discomfort.

On March 15, 2001, Lynnette Boothby of Paul Revere referred plaintiff's file, along with the report on the FCE and the report on the video surveillance, for an internal clinical review. AR 389. Judy Ellington, R.N., stated in her March 22, 2001, evaluation that "[a]fter review of the surveillance disc, it is apparent that [restrictions and limitations] are exaggerated in light of activities in which claimant participated." She added, "I am now referring this claim to Dr. McSharry for the FCE review and his responses to" the question whether there appeared to be any impairment at all. AR 387-388.

The file was then referred to Patrick F. McSharry, M.D., who completed his review on March 26, 2001. Dr. McSharry noted that the medical records, which were "sparse," claimed a "brachial plexus injury with dystonia of the affected limb."[8] However, he found that there did not "appear to be any objective evidence such as nerve condition studies, MRIs of affected areas, etc., so I must rely on the objective evidence of the video surveillance and FCE." In his opinion, the video showed "no difficulty with fine or gross motor movement of the affected arm." He saw no evidence of any type of dystonic reaction

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[8] "Brachial plexus" is "[t]he network of spinal nerves (from the lower neck and upper shoulder) that supply the arm, forearm, and hand with movement and sensation. Located in the neck-shoulder region." In a brachial plexopathy, the mechanical factors (pressure) may be complicated by ischemia (lack of oxygen caused by decreased blood flow) in the area." All-Refer.com, located at http://health.allrefer.com.

akin to "writer's cramp" during the video. He also found the FCE to be "inconsistent with this type of dystonia." He noted that while plaintiff had performed "consistently," there was "evidence of both submaximal effort and symptom magnification," a type of performance more "associated with psychological disturbance . . . than [with] physical diseases such as dystonia and brachial plexus injury." AR 387.

Dr. McSharry concluded, "There is no evidence of any physical impairment in the record I was asked to review." He noted, however, that there appeared to be very few medical records available. He indicated that "Dr. Newkirk's consultation records and any psychological or psychiatric records would also be useful if the claimant wishes to dispute the FCE and video-surveillance findings." AR 387.

On March 28, 2001, Ms. Boothby notified plaintiff that Paul Revere/UnumProvident was terminating her benefits because she did not meet the definition of disability from her occupation as laid out in the group plan. The letter of notification stated that there was no objective evidence of an impairment to show that plaintiff was unable to perform the important duties of her own occupation of administrative assistant, and also noted a number of contradictions between plaintiff's claims of disability and the other evidence. AR 394-396.

First, Ms. Boothby stated that while the restrictions and limitations listed on the periodic supplementary statements submitted by plaintiff's physician included "no data entry, typing, repetitive gripping, lifting or reaching," Paul Revere's video observation of plaintiff showed her lifting items of various weights and reaching on several different occasions, and also showed her swinging her arms while taking an hour-long walk in her neighborhood. During those activities, she showed no sign of pain. AR 396.

Second, Ms. Boothby noted that according to the FCE report, plaintiff showed symptom magnification on many of the tests, and reportedly had to end many of the tests due to pain, light-headedness, and nausea, yet those self-reports were not accompanied by physiological signs such as color change or change in heart rate. AR 395.

Third, Ms. Boothby pointed to the discrepancy between plaintiff's February 1, 2001,

complaint that she had been so traumatized after the FCE that she could not drive herself home, and the report indicating that her boyfriend had driven her to the test; and the discrepancy between her statement that she had been "virtually bedridden for several days," and was still feeling the effects of the FCE as of February 1, and the video surveillance that showed her active and driving an automobile for extended periods on January 31 and February 2. AR 395.

Fourth, Ms. Boothby asserted that Paul Revere's review of the information provided by Dr. Newkirk, compared with the FCE results and the video surveillance, showed that the restrictions and limitations provided by Dr. Newkirk were exaggerated in light of plaintiff's observed activities. Ms. Boothby also noted that plaintiff's file contained no reports of objective tests to medically support the level of restrictions or limitations that plaintiff and Dr. Newkirk were reporting. AR 395.

On June 25, 2001, plaintiff's attorney wrote a letter to UnumProvident requesting review of the decision to terminate benefits. He requested a copy of the claim file and other documentation such as claims manuals and documents relating to claims handling. On July 18, 2001, Jeanne Callaway, Senior Appeals Specialist at UnumProvident, forwarded a copy of the documents upon which the denial of benefits was based, and also advised that UnumProvident would hold the record open until August 27, 2001, to allow plaintiff to supplement the claim with any additional information. AR 422-423.

On August 27, 2001, UnumProvident wrote plaintiff's attorney to say that as plaintiff had submitted no new information, UnumProvident would begin processing the review of the appeal. AR 435. Plaintiff's attorney responded the same day, stating that he was still gathering information, and anticipated completing the process in 30 days. He stated that he had not received the claim file until July 25, 2001, and that he had not received the surveillance video tape until after that date. He asserted that UnumProvident should allow plaintiff additional time to submit evidence, and added that he considered that the period for UnumProvident to make its decision did not commence until plaintiff had completed her submissions. He requested that UnumProvident not make a decision until the end of

September 2001. AR 438-439.

On August 28, 2001, UnumProvident wrote plaintiff's attorney to say that the review of the file had been completed, and that the decision to uphold denial of benefits would stand. The letter reiterated the findings and conclusions in the March 28, 2001, letter of denial – the absence of clinical findings and diagnostic testing from a treating physician, the evidence showing symptom exaggeration, and the conflict between the restrictions/limitations and plaintiff's observed and reported activities. The letter also stated, however, in response to plaintiff's request that UnumProvident not make a decision until the end of September 2001, that UnumProvident would consider any additional information submitted by plaintiff prior to October 1, 2001. AR 441-443.

Plaintiff responded to the denial of the claim with a letter written for her by her father. She stated that she was able to carry light weights "so long as I'm not doing it for long periods repetitively." She stated further, "When I shop, I make sure my bags are light." She claimed that the reason she made four trips between her car and her residence was to avoid carrying too much weight at once. She claimed that she was unable to do "repetitive motions such as data entry" for other than small amounts of time. She asserted, "I often feel pain in my fingers, hands, and arms when carrying things" but that "I try not to show the pain by grimacing or otherwise," that the pain "is something I have learned to live with," and that "I use ice packs, heating pads, anti-inflammatory and analgesic medications on a daily basis to try to help control the pain." AR 483-484.

Plaintiff's mother wrote a letter to Paul Revere dated September 3, 2001, to describe how her daughter's life had changed since the onset of her disability. AR 456-457. Plaintiff herself wrote another letter to Paul Revere dated September 8, 2001, summarizing her work history, medical history, and physical condition from 1993 to the present. AR 458-459. On October 1, 2001, plaintiff's attorney wrote a letter to Paul Revere, asserting that the termination of benefits was not supported, and recapping the appeals process. The two letters from plaintiff and the letter from plaintiff's mother were included in the record as "additional evidence." AR 463-470.

On October 26, 2001, Dr. Newkirk wrote plaintiff's attorney a letter, apparently in response to a letter of inquiry regarding plaintiff's status. AR 493-498. In the letter, Dr. Newkirk offered his opinion that plaintiff was totally disabled from the usual duties of her occupation. He also attacked the validity and relevance of the surveillance videos, the FCE, the medical personnel who reviewed plaintiff's claim for Paul Revere, as well as Paul Revere itself and the disability insurance industry in general.

Dr. Newkirk stated that plaintiff is "definitely not able to perform the duties of an administrative assistant on a full or a part time basis" and that "[s]he has not been able to perform these duties at any time since 1997." He stated further that plaintiff's "disabling problem is compression of the brachial plexus and easily observed focal acquired limb dystonia." According to Dr. Newkirk, this condition "becomes triggered, analogous to writer's cramp, as soon as she begins to use her hands in a position that would be consistent with typing, desk work, or even working in a kitchen." He added that plaintiff "has not been able to perform these duties at any time since 1997," and that "[t]he nature of the injury will probably disable her from this type of work for the rest of her life." AR 498.

Dr. Newkirk also asserted that the surveillance videos did not support denial of plaintiff's claim, as there was not sufficient detail in the videos to show exactly how plaintiff's hands were positioned; and the body positions required to "move within the purview of the surveillance video tapes" were "neutral" body positions that would not trigger dystonia. AR 498.

Dr. Newkirk stated that the objective disorders manifested by plaintiff would be "objectively demonstrable" under two sets of circumstances – in a combined MRI/MRA, which could be performed by only one radiologist in California (a Dr. Douglas Collins at UCLA); and by "unprejudiced observation" – apparently referring to Dr. Newkirk's own observation of plaintiff, whom he claimed usually sits with her hands in a "cupped" or "closed" position. He asserted that plaintiff "continues to have these physical findings up to the present time," and that "[i]t would require a very unskilled observer to miss this fact. AR 497.

Dr. Newkirk argued that the FCE should "never be allowed to serve as evidence regarding [plaintiff's] capacity," as plaintiff obviously chose to self-limit during the tests in order to avoid further injury. He contended that the physical therapists should also have contacted plaintiff the day following the test to check on residual effects, and asserted that the physical therapist evaluators were not only unqualified to assess the psychologic aspects of the evaluation, but were also unqualified to recognize, evaluate, or accommodate focal acquired limb dystonia. He referred to the FCE as a "pseudo-test," and recommended that the results be totally discarded. AR 496.

He also asserted that the medical department at UnumProvident came to "equally nonsensical and biased conclusions," for which there were no basis in fact. He stated that he had seen plaintiff more than 30 times over the years, and claimed to know "with absolute certainty" that she not only had ischemia of the brachial plexus, but also had acquired focal limb dystonia. He found it "more than a little insulting" that "unskilled observers" could provide an opinion that is "simply a facade for negative attitude," with no "merit or organic basis whatsoever." AR 496.

He asserted that plaintiff's thoracic outlet syndrome is a condition in which "patients have negative plain film, negative plain MRIs, and negative electrical studies, yet have neurologic symptoms that are often most prominent in one or both upper extremities," and may include "lightheadedness, blurred vision, nausea, pressure in the face," and "numerous other symptoms. AR 495.

He concluded that the examination (presumably referring to the FCE) and conclusions that resulted from it were "ludicrous, and totally without merit." He again referred to his exasperation with "pseudo-tests being performed badly, without followup, and with unbelievable extrapolation, all colored by negative attitudes on the part of the evaluator, and a clear-cut lack of experience and understanding of the underlying physiologic conditions that create the condition in the first place." AR 494.

Finally, he claimed that Paul Revere seemed "to have some fascination with lack of treatment in the last couple of years." He asserted that plaintiff had tried to go out on her

own and make a living, "which she cannot do," and submitted that the reason there had been no treatment was that "the definitive studies necessary to make a diagnosis and treat her have been denied by any of the involved insurance carriers," launching into another attack on the insurance industry. AR 494. On October 31, 2001, plaintiff's attorney forwarded the letter from Dr. Newkirk to Paul Revere. AR 499.

In December 2001, Paul Revere referred plaintiff's file for internal review by David Frank, PT, MS., with directions to pose the appropriate questions to Paul Revere's own medical doctor to determine whether, based on the prior information and the additional information submitted on appeal, plaintiff did or did not have the restrictions and limitations of "no working" from March 1, 2001, to the date of the review.

Mr. Frank summarized the information in plaintiff's file – the reports by Dr. Newkirk to Kemper, from May 1997 to December 1997, and the reports of physical therapy during the same period; the report of plaintiff's June 2000 visit to Dr. Newkirk (the last time he saw plaintiff); the October 2001 letter from Dr. Newkirk to plaintiff's attorney; the report of the January 2001 FCE; and the report of the February 2001 video surveillance. Mr. Frank concluded that there was "little medical information of clinical assessments or diagnostic testing identified in the file;" that the functional abilities demonstrated in the video surveillance did appear to support ability to perform work involving the upper extremities; and that there might be appropriate restrictions and limitations, but it was not clear from the file what they might be. AR 520-523.

Following completion of Mr. Frank's review, Paul Revere referred the file to its Board-certified neurologist, Alan Neuren, M.D. Paul Revere asked Dr. Neuren to consider whether the additional information provided changed the opinion of the March 22, 2001, medical review; whether the presented diagnoses were supported by clinical assessments and diagnostic testing contained in the file; whether the functional activities demonstrated in the FCE were consistent with the presented medical information and the demonstrated physical abilities contained in the claim file; and whether symptomology from the presented diagnoses would be evident in the observed functional activities. AR 520.

Dr. Neuren completed his review on January 3, 2002. He reported that the new evidence did not provide any information that would support the claim. In particular, he noted that there was nothing in the file to indicate that Dr. Newkirk ever examined plaintiff – no assessment of the motor, sensory, or vascular supply to the extremities – and that essentially the file consisted of reports of plaintiff's description of her symptoms. He also noted there were no studies performed, such as radiographs, electrodiagnostics, or vascular studies to assess for thoracic outlet syndrome, and that there was no effort made to consider another possible cause, such as disk disease or carpal tunnel syndrome (both of which Dr. Neuren considered more common than thoracic outlet syndrome). AR 525-526.

With regard to the video surveillance, and Dr. Newkirk's comment that the position of plaintiff's hands was "neutral" in all the observed activities, Dr. Neuren noted that the position of the arms required to operate a motor vehicle is far less "neutral" than the position required to operate a word processor. He took issue with Dr. Newkirk's characterization of the limb dystonia as "secondary" to brachial plexus ischemia – describing it as a "novel theory of dystonia that is not supported by the literature." He also disputed Dr. Newkirk's claim that the vascular studies necessary to document the condition of thoracic outlet syndrome are available at only one location in California, asserting that the ability to diagnose arterial or venous thoracic outlet can be done in most hospitals capable of doing vascular studies. He asserted – contrary to Dr. Newkirk's opinion that electrical studies will not demonstrate brachial plexus ischemia or compression – that any injury significant enough to cause disabling symptoms to the brachial plexus should readily be demonstrable by electrodiagnostic studies. AR 526. He explained the differences between neurological thoracic outlet syndrome and vascular thoracic outlet syndrome, in terms of causes and demonstration by clinical findings, and disputed Dr. Newkirk's contentions regarding the frequency of incidence of neurogenic thoracic outlet syndrome. AR 525.

Finally, Dr. Neuren questioned the validity of Dr. Newkirk's assessment of the FCE,

asserting that there is no mechanism by which a dystonia will be permanently worsened by provocative testing. After noting that Dr. Newkirk had observed that plaintiff's symptoms would be worsened by performing tasks with the arms placed in front of the body, Dr. Neuren pointed out that the surveillance video showed plaintiff driving with no difficulty, which requires the arms to be positioned in front of the body. He also found that plaintiff's complaints about her increased symptomology in the days following the FCE were obviously not supported by her behavior when under surveillance during the same period. He concluded that plaintiff's subjective complaints were not confirmed by objective findings, and also were not supported by her observed behavior. AR 525.

DISCUSSION

A. Legal Standard

A challenge to an ERISA plan's denial of benefits is reviewed de novo unless the plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits of to construe the terms of the plan. See Aetna Health, Inc. v. Davila, 542 U.S. 200, 210 (2004); Johnson v. Buckley, 356 F.3d 1067, 1075 (9th Cir. 2004). When such discretion exists, the district court reviews the administrator's determinations for an abuse of discretion. See Jebian v. Hewlett Packard Co. Employee Benefits Organization Income Protection Plan, 349 F.3d 1098, 1102-03 (9th Cir. 2003). This standard is the same as "arbitrary and capricious." Id.; see also Tremain v. Bell Indus., Inc., 196 F.3d 970, 975 n.5 (9th Cir. 1999). The "abuse of discretion" standard may be heightened by the presence of a serious conflict of interest by the plan administrator. Alford v. DCH Found. Group Long Term Disability Plan, 311 F.3d 955, 957 (9th Cir. 2002).

The court previously ruled that the standard of review in the present case is abuse of discretion. See Order Granting Request to Establish that Standard of Review is Abuse of Discretion, filed Apr. 11, 2005; see also Order Denying Request to Allow Discovery, filed Oct. 19, 2005. Ordinarily, summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ERISA actions, however, where the plaintiff is challenging the plan

administrator's denial of benefits and the district court has already determined that the abuse of discretion standard of review applies, "a motion for summary judgment is merely the conduit to bring the legal question before the district court and the usual tests of summary judgment, such as whether a genuine dispute of material fact exists, do not apply." Bendixen v. Standard Ins. Co., 185 F.3d 939, 942 (9th Cir. 1999).

Under the abuse of discretion standard, the issue before the court is not whether Paul Revere reached the "correct" decision; the issue is whether there is substantial evidence in the record to support Paul Revere's decision. Snow v. Standard Ins. Co., 87 F.3d 327, 331-32 (9th Cir. 1996) (abuse of discretion standard does not permit overturning of decision where there is "substantial evidence" to support decision – that is, where there is relevant evidence that reasonable minds might accept as adequate to support conclusion even if it is possible to draw two inconsistent conclusions from evidence), overruled on other grounds, Kearny v. Standard Ins. Co., 175 F.3d 1084 (9th Cir. 1999). Even decisions directly contrary to evidence in the record may not necessarily amount to an abuse of discretion. Taft v. Equitable Life Assur. Soc., 9 F.3d 1469, 1473 (9th Cir. 1993).

An ERISA administrator abuses its discretion only if it renders a decision without explanation, construes provisions of the plan in a way that conflicts with the plain language of the plan, or relies on clearly erroneous findings of fact. Bendixen, 185 F.3d at 944; Atwood v. Newmont Gold Co., 45 F.3d 1317, 1323-24 (9th Cir. 1995). The district court should uphold the decision of an ERISA plan administrator "if it is based upon a reasonable interpretation of the plan's terms and was made in good faith." Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan, 410 F.3d 1173, 1178 (9th Cir. 2005) (quotations and citations omitted). The court may not substitute its judgment for that of the administrator unless the latter's decision was clearly erroneous in light of the available record, or there was no reasonable basis for it. Bendixen, 185 F.3d at 944.

B. Defendants' Motion

Defendants now move for summary judgment, arguing that the claims administrator, Paul Revere, did not abuse its discretion in determining that plaintiff is no longer entitled to

long-term disability benefits under a group disability policy issued by Paul Revere. Defendants argue that the medical evidence contains no medical findings that support the existence of a disability, that plaintiffs' activities are inconsistent with her complaints of pain, and that there is evidence that she has misstated and overstated her complaints of pain. Defendants assert further that there is no evidence that Paul Revere's decision was motivated by a conflict of interest caused by its dual role as insurer and claims administrator.

First, defendants assert that the clinical findings in the record do not support a claim of disability. They argue that the medical records do not reflect the results of physical examination or diagnostic testing, despite the fact that the injuries and illnesses that are the purported cause of plaintiff's disability – thoracic outlet syndrome, acquired dystonia, and ischemia of the brachial plexus – can be established through physical examination findings and diagnostic test results. Defendants assert that rather than provide medical evidence, plaintiff has simply relied on conclusory statements by Dr. Newkirk.

Defendants note, however, that Dr. Newkirk made statements in his October 2001 report about plaintiff's condition as of that date, even though he had not seen her since June 2000. They claim in addition that the statements that plaintiff was not able to perform the duties of an administrative assistant and had not been able to do so at any time since 1997 contradicted his prior statements that plaintiff would be able to return to work. Defendants also assert that Dr. Newkirk failed to explain why plaintiff, with such supposedly severe limitations, could still undertake numerous strenuous upper extremity activities. Defendants contend that the physicians who reviewed the claim for Paul Revere – most notably Dr. Neuren – provide specific and detailed analysis that establishes why Dr. Newkirk is incorrect in his opinion and why the evidence in the administrative record does not support the existence of a disability.

Second, defendants contend that plaintiff's claims regarding her symptoms are in conflict with the evidence regarding her activities. They note that plaintiff was able to work at Restoration Hardware, at Nordstrom, and at an art gallery during the time she was

supposedly too disabled to work, and that she was able to lift light weights for exercise, a far more strenuous upper extremity activity than the activities performed at her job at Sazevich.

Defendants point out that by her own admission plaintiff was able to stock shelves, work on a cash register, and do some data entry. They argue that Dr. Newkirk's limitations of no "typing [or] repetitive gripping, lifting, or reaching" are contradicted by plaintiff's ability to perform these activities. Defendants also contend that plaintiff's report to the FCE examiner, that "[a]ny task requiring use of the upper extremities, especially gripping and fingering activities," caused her to report the most pain and discomfort is contradicted by these activities. Defendants argue that these activities, combined with the absence of medical findings, combined with the complete absence of treatment, is enough to provide a reasonable basis for Paul Revere's decision.

Defendants argue in addition that Paul Revere has evidence that directly contradicts plaintiff's complaints of pain. Specifically, at a time when plaintiff claimed she was still experiencing after-effects from the FCE, and that she was virtually bedridden, she was filmed on the surveillance video engaging in various activities such as driving an automobile and shopping for groceries, without any evidence of pain.

In a third and related argument, defendants contend that the evidence shows that plaintiff has exaggerated or magnified her symptoms. They note that the FCE evaluator reported that plaintiff was "self-limiting during the exam and very hesitant to perform most of the tasks" and that "symptom magnification was observed;" that plaintiff reported a need for frequent breaks, and left the room twice to "get air;" that most of plaintiff's complaints involved reports of light-headedness and nausea, which reported symptoms were not accompanied by physiological signs of color change or heart rate change; that plaintiff failed to complete a number of the tests; and that any task requiring the use of the upper extremities, especially gripping and fingering activities, caused plaintiff to report the most pain. They also note the FCE's evaluator's conclusion – that "[b]ecause of self-limited performance, the majority of [plaintiff's] abilities remain left to conjecture," and that

successful return to work would be limited "unless the non-organic component of her problem is addressed."

Defendants assert that this report from the FCE evaluator, combined with the video surveillance showing plaintiff walking, swinging both arms, driving an automobile, pushing a shopping cart and shopping for groceries, loading items into the trunk and back seat of the car, and retrieving items from the trunk and back seat, all with no apparent discomfort, establish that plaintiff exaggerated her symptoms. Defendants also note that the video shows plaintiff functioning normally at a time when she was reporting to the FCE evaluator that she was still feeling adverse effects from the FCE, symptoms purportedly so severe that they left her bedridden.

Finally, defendants contend that there is no evidence that Paul Revere's decision was motivated by a conflict of interest in its dual role as claims administrator and insurer. They claim that there is no material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that Paul Revere's self-interest caused a breach of its fiduciary duty to the plaintiff. Defendants assert that plaintiff is a young person who claims she is permanently precluded from a job that involves filing, answering the phone, and working at a keyboard – but who provides no physical examination results or diagnostic studies in support of this claim, even though tests are available to determine the existence of this purportedly disabling condition, and who is not receiving any treatment for the alleged condition.

Plaintiff opposes the motion, arguing that the termination of benefits was improper. She claims that she submitted ample evidence that she could no longer work at her occupation, that Paul Revere's explanation for the denial of benefits is not persuasive, and that the termination of her claim should be reviewed de novo because of Paul Revere's conflict of interest.

In response to defendants' argument that Dr. Newkirk's conclusions were not supported by clinical findings or objective diagnostic tests, plaintiff argues that the policy does not require objective proof of a disabling condition, and that nothing in the file

establishes that a reliable diagnosis could not be made without the various tests discussed by Dr. Neuren in his evaluation of plaintiff's claim. Plaintiff claims that Paul Revere arbitrarily rejected the opinions of plaintiff's treating physician; and has wrongfully insisted on objective evidence.

Plaintiff asserts nonetheless that Dr. Newkirk's diagnosis was based on objective observations, citing to the October 26, 2001, letter, in which Dr. Newkirk stated that the two types of disorders manifested by plaintiff – compression of blood supply to brachial plexus, and acquired limb dystonia – are objectively demonstrable under two circumstances – in a combined MRI/MRA as performed by Dr. Collins at UCLA, and in "unprejudiced observation."

Plaintiff also argues that the claim that Dr. Newkirk's conclusions were not supported by examinations of plaintiff ignores the evidence – specifically, Dr. Newkirk's numerous reports to the worker's compensation carrier, and his exam notes on November 12, 1997 – reflecting the more than 30 times that Dr. Newkirk saw plaintiff. Plaintiff claims that the fact that Dr. Newkirk did not consider other potential causes of plaintiff's symptoms, such as disk disease or carpel tunnel syndrome, is not significant because there is no requirement that a treating physician's records show that he has considered every possible diagnosis. Plaintiff asserts that it was Paul Revere that failed to provide adequate medical proof that plaintiff was not disabled, by failing to obtain an independent medical examination (IME).

Second, with regard to the argument that plaintiff's claims conflict with the evidence of her activities, plaintiff responds that her reported activities do not show that she can work full-time as an administrative assistant; that the FCE does not establish her ability to work as an administrative assistant; and that the activities shown on the video are not inconsistent with a finding of disability and do not show that she can work as an administrative assistant.

Third, with regard to defendants' claim that the evidence shows that plaintiff magnified or exaggerated her symptoms, plaintiff notes that the FCE evaluator stated that the evaluation did not establish that she was able to work. She also argues that the

physical therapist was not qualified to render psychological opinions; that the FCE does not explain what is meant by "symptom magnification" or "submaximal effort;" that there is no factual basis in the FCE for a conclusion that plaintiff magnified her symptoms; and that the video surveillance produced so brief and limited a record that it is useless as an indicator of what plaintiff can and cannot do.

The court finds that the motion must be GRANTED. The issue for the court is whether Paul Revere abused its discretion in finding that plaintiff was not eligible for benefits under the policy. Paul Revere did not render its decision without explanation, did not construe provisions of the plan in a way that conflicts with the plain language of plan, and did not rely on clearly erroneous findings of fact in making the determination to terminate benefits. See Bendixen, 185 F.3d at 944; Atwood, 45 F.3d at 1323-24. Rather, Paul Revere reasonably concluded that plaintiff had not established that she could not return to her occupation, based on the lack of objective medical findings in the record, and based on the conflict between plaintiff's reported symptoms on the one hand, and the evidence of plaintiff's activities and functional capacity on the other.

In arguing that Paul Revere abused its discretion by terminating benefits without ordering an IME, plaintiff suggests that it was Paul Revere's burden to show the existence of a disability as defined in the policy. However, the policy clearly places the burden of proof in establishing disability on the claimant. The policy requires the claimant to first provide written notice of intent to file a claim, then to complete the "Proof of Loss" form and submit it within 15 days of providing written notice. The policy states that "[w]ritten proof should establish facts about the claim such as occurrence, nature and extent of the Disability involved," and that "[a]ny accrued benefits payable are subject to Our receiving proof of loss."

Similarly, plaintiff's argument that Paul Revere was required to arrange for her to visit Los Angeles to obtain an MRI/MRA from Dr. Collins – which Dr. Newkirk claimed was the single method available for confirming his diagnosis – or some other type of neurological evaluation is without merit, as it was plaintiff's responsibility to provide Paul

Revere with medical evidence supporting her claim of disability. Once Paul Revere had a reasonable basis for denying the claim – as it did here – Paul Revere had no obligation to seek out medical evidence that unambiguously established that plaintiff was not disabled, as it is plaintiff's burden to provide evidence showing that she is entitled to disability benefits under the Plan. Nor was Paul Revere required to accept Dr. Newkirk's opinion without question, simply because he is the physician who treated plaintiff. Paul Revere cannot ignore Dr. Newkirk's medical findings without any explanation, but is not obligated to accept them if it can establish a reasonable basis for doing otherwise.

Paul Revere clearly explained its reason for finding that plaintiff was not "disabled" under the policy – that there are no clinical findings or diagnostic tests in the record that support a finding of disability. The sicknesses and injuries reported by plaintiff – thoracic outlet syndrome, acquired dystonia, and ischemia of the brachial plexus – are of the type that can be established through physical examination findings and diagnostic test results. As Dr. Neuren, a board certified neurologist, stated, "All of these conditions will have readily demonstrable findings on clinical as well as diagnostic studies." AR 525. However, there are no such clinical findings or diagnostic studies shown in the medical records from Dr. Newkirk.

Despite being given the opportunity to do so by Paul Revere, plaintiff did not provide any such evidence. In the August 28, 2001, letter denying plaintiff's claim, Paul Revere stated that its in-house medical department had noted the absence of any clinical findings and/or treatment. In addition, Paul Revere stated that UnumProvident would consider any further information submitted by plaintiff prior to October 1, 2001. This was a clear invitation for plaintiff to submit additional medical evidence, yet plaintiff did not do so. The only additional medical "evidence" submitted by plaintiff was Dr. Newkirk's October 26, 2001, letter to plaintiff's counsel, which included no clinical findings or diagnostic studies. Moreover, although Dr. Newkirk stated in that letter that plaintiff "continues to have these physical findings up to the present time," the evidence shows that he had not even seen her since June 2000. Thus, he had no basis for providing an opinion as to her condition in

October 2001.[9]

Dr. Newkirk claimed in the October 2001 letter that patients with thoracic outlet syndrome will have "negative plain films, negative plain MRIs, and negative electrical studies," yet will have symptoms such as "light-headedness, blurred vision, nausea, pressure in the face, as well as numerous other symptoms." However, this is the first mention of these symptoms (other than as reported by plaintiff during the FCE), and, as with plaintiff's other reported symptoms, there are no substantiating clinical findings or diagnostic studies.

There is no indication in the record that Dr. Newkirk based his diagnosis on anything other than plaintiff's subjective complaints, but the restrictions and limitations he imposed on plaintiff do not appear valid in light of the activities plaintiff was able to engage in. Moreover, plaintiff's subjective complaints – the sole basis for the disability claim – are not credible because there is evidence, taken together, which indicates that she exaggerated or magnified her symptoms.

Paul Revere also reasonably concluded that Dr. Newkirk's opinions were contradicted by plaintiff's activities. For example, Dr. Newkirk stated that plaintiff's dystonia was triggered by any use of her hands in a position consistent with typing, desk work, or working in a kitchen, and also stated that performing tasks in front of the body would immediately create an aggravation of the dystonia. However, plaintiff's activities (lifting light weights, working on a cash register, typing while employed at Restoration Hardware, doing data entry while employed at Alexandria Gallery) show no such apparent immediate aggravation.

Dr. Newkirk's opinions were also in conflict with the evidence from the surveillance video. As Dr. Neuren noted, driving an automobile requires placement of the arms and

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[9] An additional contradiction is reflected by the fact that Dr. Newkirk consistently reported to plaintiff's worker's compensation carrier in 1997 that plaintiff would be able to return to work at some time in the near future. See AR 139, 141, 143, 147, 152, and 167. Yet in October 2001 – without any explanation – he claimed that she had been totally disabled from her occupation since 1997.

hands in front of the body – the very activity that Dr. Newkirk claimed would provoke dystonia. The surveillance video, in conjunction with plaintiff's letter of February 1, 2001, to the FEC physical therapist, also indicate that plaintiff was magnifying her symptoms. She was supposedly bed-ridden after the FCE, and was still feeling the "adverse effects" of the testing on February 1, the same day that she was observed walking, using a key to unlock doors, driving an automobile, pushing a shopping cart, raising and lowering the trunk lid, and lifting bags in and out of the car.

With regard to the FCE, Paul Revere reasonably concluded that the physical therapists at US Healthworks were qualified to interpret the test results. While plaintiff complained of the most pain with any task involving the use of the upper extremities, she was observed soon afterwards performing such tasks without difficulty. Although plaintiff argues that the FCE did not establish her ability to work, the court notes that the FCE report actually stated that plaintiff "does not demonstrate the ability to work as an administrative assistant" – a comment on plaintiff's "demonstrated" abilities, not on her actual ability to work. The report then went on to state why plaintiff's demonstrated abilities were not valid, including the fact that there was symptom magnification and a self-limiting performance.

CONCLUSION

In accordance with the foregoing, the court hereby GRANTS defendants' motion for summary judgment. Where, as here, the insurance policy is both issued and administered by the defendant, there is an apparent conflict of interest. Bendixen, 185 F.3d at 943. Such apparent conflict, however, is not enough by itself to establish a serious conflict warranting de novo review. Jordan v. Northrop Grumman Corp. Welfare Benefit Plan, 370 F.3d 869, 876 (9th Cir. 2004). To establish a serious conflict that would justify de novo review despite a conferral of discretion, the beneficiary has the burden to come forward with "material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self-interest caused a breach of the administrator's fiduciary obligations to the beneficiary." Alford, 311 F.3d at 957; see also Hensley v. Northwest

Permanente P.C. Ret. Plan & Trust, 258 F.3d 986, 994-95 & n.5. If the beneficiary cannot satisfy this burden, the district court must apply the traditional abuse of discretion review. Hensley, 258 F.3d at 995; Atwood, 45 F.3d at 1323.[10]

Plaintiff in this case has not met her burden of providing material probative evidence, apart from the mere fact of the apparent conflict, showing that Paul Revere's self-interest caused a breach of its obligations to plaintiff. See Nord v. Black & Decker Disability Plan, 356 F.3d 1008, 1010 (9th Cir. 2004) (material, probative evidence consists of, e.g., inconsistencies in administrator's reasons, insufficiency of those reasons, or procedural irregularities in processing of beneficiary's claim). Accordingly, the court is required to give significant deference to Paul Revere's decision, and may not substitute its judgment for the judgment of the administrator. Bendixen, 185 F.3d at 944.

Paul Revere has provided a reasonable basis for its decision, and the court therefore cannot say that Paul Revere abused its discretion. The record reflects no substantive evidence of disability – no physical examinations and no objective diagnostic tests. Paul Revere's decision that plaintiff was not disabled under the policy definition was not an abuse of discretion because it was reasonable and supported by substantial evidence in the administrative record as a whole. See McKenzie v. General Tel. Co. of Cal., 41 F.3d 1310, 1316-17 (9th Cir. 1994). In view of plaintiff's failure to provide evidence of disability, Paul Revere was under no obligation to provide an independent medical examiner to conduct an actual physical examination.[11]

Plaintiff has not established that Paul Revere abused its discretion in determining that she did not meet the definition of "disabled" under the policy. Nor has she shown that

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[10] At the hearing on the motion, plaintiff's counsel argued that under Evans v. UnumProvident Corp., 434 F.3d 866 (6th Cir. 2006), an opinion issued by the Sixth Circuit two days after plaintiff filed the opposition brief, the court is required to consider the apparent conflict as a factor, even where the court has determined that the appropriate standard is abuse of discretion. As indicated above, this is not the standard employed in the Ninth Circuit.

[11] Evans is distinguishable from the present case on this basis, as the Sixth Circuit found that the administrator had "ignored reliable medical evidence proffered by plaintiff." See Evans, 434 F.3d at 879.

Paul Revere construed any provisions of the plan in a way that conflicts with the plain language of the plan, or relied on clearly erroneous findings of fact in making the benefit determinations at issue.

IT IS SO ORDERED.

Dated: April 25, 2006

PHYLLIS J. HAMILTON
United States District Judge